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5 UNITED STATES BANKRUPTCY COURT
6 EASTERN DISTRICT OF CALIFORNIA
FRESNO DIVISION

7 In re) Case No. 16-10169-B-13
8 Frank Miranda Does and)
9 Mary Anne Souza Does,) DC No. AMM-2
10 Debtors.)
11

12 **MEMORANDUM DECISION ON BUNNETT & COMPANY**
13 **AND ENERGY FEEDS INTERNATIONAL, LLC'S**
14 **MOTION TO DISMISS CASE**

15 **INTRODUCTION**

16 “Revenge should have no bounds” muses King Claudius to Laertes as they
17 connive a star-crossed tactical plan for Prince Hamlet’s early demise.¹ While
18 successful, their plan resulted in unintended and tragic consequences for most of
19 the principal characters in the famous play. This case illustrates how far two
20 parties’ perceived condign for the other’s assumed wrongs may go when one
party ends up in Bankruptcy Court.

21 Here, a former employee of two suppliers of components of dairy cattle
22 nutrition, who left over issues of customer treatment and job related stress, was
23 sued by his former employers for allegedly competing against them. After the
24 employee and his spouse filed this bankruptcy case, the lawsuit was stayed but
25 facts were exposed suggesting the debtors were not candid with the court and
26 creditors.

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¹ William Shakespeare’s “Hamlet” Act IV Scene 7.

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1 23, 2015, he claimed he was suffering from stress fostered by policy and
2 management changes at Bunnett.⁶ Both parties concede there is no express
3 contractual basis preventing Frank from competing with Bunnett. When Frank
4 resigned, two other sales people also resigned from Bunnett, Ray Gearheart and
5 John Franklin.⁷

6 Mary Anne is an appraiser. She works in Atwater, California, where
7 Frank and Mary Anne reside. When Frank resigned from Bunnett, he and Mary
8 Anne formed a company, FM Ag Enterprises, Inc. ("FM Ag"). Mary Anne
9 testified that it was not their intention for Frank to work for FM Ag. However,
10 shortly after he left Bunnett, Frank told Andrew Lott, a hauler Frank worked
11 with, that his new contact information was FM Ag. In early November 2015, a
12 subsidiary of Wawasan, Paros Limited ("Paros"), paid FM Ag \$20,000 for a
13 marketing study purportedly prepared by Mary Anne. Mary Anne does not have
14 a copy of that study and has never produced it.

15 November 2015 proved a pivotal month. Frank, John Franklin and Ray
16 Gearheart joined forces in negotiating with Natural Soda for a sales agent
17 relationship. The three hired the same law firm to represent them in that
18 negotiation. After final documentation was exchanged, the negotiations were
19 abruptly aborted. During November and the following months, Frank had either
20 received phone calls from or had contacted various suppliers and customers of
21 Bunnett, including Mission Ag, Dewco, OCI International, Inc. ("OCI"), and
22 Wawasan. Frank arranged relationships with Wawasan and his other contacts,
23 including dairymen, over the period of a few months. Wawasan's primary
24 contact in America was through an American subsidiary, Agrofin. Wei Su was
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26 ⁶Frank applied for worker's compensation because of stress-related issues.

27 ⁷Bunnett also presented testimony that Frank compromised his company
28 computer's hard drive and removed approximately 1,000 "files" from the memory
before returning the computer. His "company's iPad" was returned with factory
settings.

1 the primary contact at Agrofin.

2 Also in November 2015, Frank withdrew his worker's compensation
3 claim. With counsel's assistance, he pursued a claim for disability and began
4 receiving disability payments. The *bona fides* of the disability claim would prove
5 to be a substantial issue in the bankruptcy case.

6 In late November 2015, Bunnett sued Frank, Natural Soda and others in
7 the Texas State Court for various business torts and trade infringement. The
8 Texas State Court issued a temporary restraining order restricting Frank's
9 contacts with his former business associates, customers and suppliers. In
10 December 2015, Frank removed the Texas litigation to the Federal District Court
11 in the Western District of Texas. At this time, and until early January 2016,
12 Frank "disappeared" and became "nonexistent."⁸

13 In the beginning of January 2016, Ray Gearheart was contacted by
14 Wawasan to discuss a way monies could be paid to Frank so that he could have
15 funds to defray his mounting legal costs and living expenses. Frank testified that
16 Wawasan's generosity was possibly motivated by their desire for Frank to work
17 for them "at some moment in the future." In mid-January 2016, Frank and Ray
18 Gearheart communicated. Ray testified that the Wawasan payments would
19 amount to \$40,000 which would be payable at \$20,000 in January 2016 with the
20 remaining \$20,000 to be paid "sometime later." Frank gave Ray the names of
21 friends and family members and provided contact information where the money
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23 ⁸The parties have stipulated to the admission of testimony of certain witnesses
24 by deposition instead of trial testimony. Some of these depositions were taken in the
25 Texas lawsuits. Ray Gearheart was originally to testify at trial. However, Bunnett was
26 unsuccessful in serving a subpoena. Bunnett and Dore stipulated that Bunnett had not
27 been able to procure Ray Gearheart's live testimony by any reasonable means and
28 therefore under Federal Rule of Evidence 804(a), the court deemed Ray Gearheart
"unavailable." The deposition testimony of Wei Su, Todd Gearheart, Ray Gearheart's
son, Brian D'Ewart of Dewco, John Franklin and Andrew Lott was allowed by
stipulation of the parties. While the court is therefore unable to assess credibility of
those witnesses, a risk both parties are evidently willing to take, the court has reviewed
the deposition testimony highlighted by both parties. The reference above is to the
transcript of Wei Su's deposition. 40:13-25; 61:7-62:7.

1 could be transmitted. The names Ray Gearheart received were Marcio Relva,
2 Frank's brother-in-law, Angel Hernandez, an acquaintance and contractor, and
3 Teresa Miranda, Frank's grandmother. Teresa Miranda was being cared for by
4 Mary Does, Frank's mother. Frank's and Mary Anne's testimony was that they
5 disclaimed any interest in the proposed payments then and always.

6 Meanwhile, the Federal District Court in Texas also issued a temporary
7 restraining order which was set to expire at the beginning of February 2016. As
8 did the restraining order issued by the Texas State Court, the Federal District
9 Court order essentially prevented Frank from competing with Bunnett until the
10 litigation could be resolved.

11 2. The Bankruptcy Filing and Coincident Events:

12 Frank and Mary Anne filed this chapter 13 bankruptcy case on January 22,
13 2016. Both Frank and Mary Anne signed the petition, schedules and statement of
14 affairs. They also signed declarations regarding their projected disposable
15 income. Both declarations stated that Frank was disabled and unable to work and
16 would be unable to receive the same salary as he had in the previous six months.
17 Neither the schedules nor the declarations mention anything about the \$40,000
18 payable by Wawasan.

19 Ray Gearheart arranged for his son Todd to receive funds from Wawasan
20 and Todd then forwarded the funds to the persons Frank identified. According to
21 the testimony, Mr. Relva, Mr. Hernandez, and Mary Does were all contacted by
22 Frank and alerted that monies for Frank and Mary Anne's benefit could soon
23 come to them in the form of checks. In fact, Todd Gearheart received \$20,000
24 from Wawasan on January 26, 2016, and the next day sent \$5,000 to Mario Relva
25 and \$15,000 to Angel Hernandez. Wawasan sent the other \$20,000 about two
26 months later, in March 2016. Ten Thousand dollars (\$10,000) of the second
27 payment was given to Angel Hernandez and the remaining \$10,000 to Teresa
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1 Miranda; because she was in Mary's care, Mary cashed the check and handled the
2 money.

3 Frank and Mary Anne had their meeting of creditors under U.S.C. §
4 341(a) of the Bankruptcy Code on March 8, 2016. No mention was made of the
5 payments from Wawasan.⁹

6 Immediately after the bankruptcy was filed, Frank and Mary Anne filed a
7 motion for contempt against Bunnett for pursuing discovery in the Texas Federal
8 Court action violating the automatic stay (DC No. FW-1, Doc. #7). Bunnett filed
9 a countermotion for stay relief and to confirm the absence of the automatic stay
10 of § 362 (DC No. AMM-1, Doc. #31) on February 9, 2016. Those motions have
11 not been heard.

12 Frank and Mary Anne filed amended schedules on March 23, 2016 (Doc.
13 #87). The amendments increased their tax claims (Frank and Mary Anne's 2015
14 taxes had been liquidated) and added taxes due to the Franchise Tax Board. The
15 amendments also listed various changes in their Official Form 122C-2 regarding
16 their projected income. (Doc. #88.) The \$40,000 payments from Wawasan were
17 not disclosed.

18 3. Events Following the Bankruptcy Filing:

19 On May 23, 2016, Frank and Mary Anne's chapter 13 plan was confirmed
20 without objection. The plan provides for monthly payments to the chapter 13
21 trustee of \$1,205 for sixty (60) months. Frank and Mary Anne propose to
22 surrender their "investment" real property. They propose to continue making
23 their house payments and payments on two timeshares owned by a trust. They
24 will continue to make payments on a 2016 Ford Lariat and on a 2013 Lincoln
25 Navigator. The order confirming plan does provide that the case will be set for
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27 ⁹Exhibit 3.

1 annual review of the Dore's income by the trustee.

2 Bunnett filed no proof of claim in the bankruptcy case. Bunnett also did
3 not object to confirmation of the chapter 13 plan.

4 Following scheduling conferences on the motion for contempt and
5 countermotion for stay relief, Bunnett and the Dore's negotiated a proposed
6 settlement of their differences. During the course of that negotiation and in the
7 context of the continuing Texas litigation, Bunnett discovered the previously
8 undisclosed \$40,000 in Wawasan payments. When Bunnett confronted the
9 Debtors with this information, Frank and Mary Anne signed two additional
10 declarations which stated in part that they did not receive the funds directly nor
11 receive any benefit from the funds. However, other testimony was that a portion
12 of the money was used to pay an overdue school tuition bill for Frank and Mary
13 Anne's children, for payment on a timeshare, and for a payment on a storage
14 facility. The settlement was not finalized or approved. Twenty-thousand dollars
15 (\$20,000) of the \$40,000 in Wawasan payments was returned by Hernandez and
16 Relva to Frank and Mary Anne's counsel where it was deposited in counsel's
17 trust account. The remaining \$20,000 is still missing but at least part of it was
18 spent by Hernandez and Mary Dore's.

19 Bunnett's founder, Bill Bunnett, testified that Bunnett has filed another
20 lawsuit alleging RICO violations and other claims against numerous defendants,
21 including some of the recipients of the Wawasan payments. Mr. Bunnett testified
22 that Frank would be added as a defendant if the bankruptcy case was dismissed.
23 On August 17, 2016, this motion to dismiss was filed (the "Motion").¹⁰

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27 ¹⁰Doc. #161.
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JURISDICTION

This court has jurisdiction of this contested matter by reference from the United States District Court for the Eastern District of California pursuant to 28 U.S.C. § 157(b)(2)(A). The district court has jurisdiction pursuant to 28 U.S.C. § 1334(b) in that this is a civil proceeding arising under Title 11 of the United States Bankruptcy Code. This is a “core” proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O). Bunnett and the Debtors agree that this court can hear and determine this matter if it is ever determined to be a matter that cannot be heard and determined of right by a bankruptcy judge under under 28 U.S.C. § 157(c)(2).¹¹

CONTENTIONS OF THE PARTIES

Bunnett contends that the failure of the Dores to disclose Frank’s pre- and post-petition continued contacts with those involved in the dairy feed industry after leaving Bunnett’s employment, the establishment of FM Ag as a facade to veil future payments for Frank, and failure to disclose the \$40,000 in Wawasan payments, establish that this chapter 13 case was filed in bad faith and should be dismissed with prejudice. Bunnett points to the various documentary and testimonial evidence contradicting Frank’s and Mary Anne’s version of events and their continued insistence that they did not receive any benefit from the \$40,000 as indicative of bad faith and supports dismissal with prejudice.

The Dores contend that a review of the totality of the circumstances, as required by controlling Ninth Circuit authority in deciding a motion to dismiss, shows that Bunnett has not met its burden of establishing “cause” for dismissal on the grounds of bad faith. The Dores rely on their subjective belief regarding

¹¹Final pre-trial order (doc. #361).

1 the ownership and use of the funds paid by Wawasan and emphasize the fact that
2 no contract prevented Frank from entering into relationships competitive with
3 Bunnett. The Dores also contend that the court should take into account the
4 debilitating stress Frank suffered at the hands of Bunnett. Alternatively, the
5 Debtors contend that, even if the court is inclined to dismiss Frank from the
6 bankruptcy case, Mary Anne should be permitted to continue the chapter 13 case
7 until she receives a discharge.

8 9 **DISCUSSION**

10 1. Legal Framework, Burden and Standard of Proof.

11 Section 1307(c) sets forth a non exclusive list of factors that constitute
12 “cause” for conversion or dismissal. *Schlegel v. Billingslea, Jr. (In re Schlegel)*,
13 526 B.R. 333, 338 (9th Cir. BAP 2015). Although not specifically listed, bad
14 faith is a “cause” for dismissal under § 1307(c). *Eisen v. Curry (In re Eisen)*, 14
15 F.3d 469, 470 (9th Cir. 1994). In this Circuit, bankruptcy courts make good faith
16 determinations on a case-by-case basis, after considering the totality of the
17 circumstances. *Leavitt v. Soto (In re Leavitt)*, 171 F.3d 1219, 1224 (9th Cir.
18 1999). Debtors may be found to have either filed the bankruptcy petition or a
19 chapter 13 plan in bad faith. *Ellsworth v. Lifescape Medical Associates, P.C. (In*
20 *re Ellsworth)*, 455 B.R. 904, 914 (9th Cir. BAP 2011). Even though the court
21 may have found impliedly or explicitly that a chapter 13 plan was proposed in
22 “good faith,” the court can review that finding post-confirmation if new
23 information comes to light. *In re Luxford*, 368 B.R. 63 (Bankr. D.Montana
24 2007). Further, a creditor need not file a proof of claim to have standing to move
25 to dismiss for cause. *de la Salle v. U.S. Bank, N.A. (In re de la Salle)*, 461 B.R.
26 593, 604 (9th Cir. BAP 2011).

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1 The parties in this case agree that the “factors” set forth in *Leavitt* are the
2 framework for the court’s analysis. The so-called “*Leavitt* factors” are: (1)
3 whether the debtor misrepresented facts in his petition or plan, unfairly
4 manipulated the Bankruptcy Code, or otherwise filed his chapter 13 petition in an
5 inequitable manner; (2) the debtor’s history of filings and dismissals; (3) whether
6 the debtor only intended to defeat state court litigation; and (4) whether egregious
7 behavior is present. *In re Leavitt* 171 F.3d at 1224. In addition, a “court must
8 make its good faith determination in light of all militating factors.” *Ho v. Dowell*
9 (*In re Ho*), 274 B.R. 867, 876 (9th Cir. BAP 2002) (citing *Goeb v. Heid (In re*
10 *Goeb)*, 675 F.2d 1386, 1390 (9th Cir. 1982)). While the application of the
11 *Leavitt* factors inform the process, “the court is not obligated to count the four
12 *Leavitt* factors as though they present some sort of a box-score but rather is to
13 consider them all and weigh them in judging the ‘totality of the circumstances.’”
14 *In re Lehr*, 479 B.R. 90, 98 (Bank. N.D.Cal. 2012). “The bankruptcy court is not
15 required to find that each [*Leavitt*] factor is satisfied or even to weigh each factor
16 equally.” *Khan v. Curry (In re Khan)*, 523 B.R. 175, 185 (9th Cir. BAP 2014).
17 Rather, “[t]he *Leavitt* factors are simply tools that the bankruptcy court employs
18 in considering the totality of the circumstances.” *Id.*

19 Before looking at the case through the prism of the *Leavitt* factors, the
20 *Dores* have asked the court to require the movants to provide “clear and
21 convincing” evidence in support of the Motion. The court declines to do so. The
22 “preponderance of the evidence” standard has been applied by courts in this
23 Circuit to motions to dismiss under chapter 7, *Aspen Skiing Company v. Cherrett*
24 (*In re Cherrett*), 523 B.R. 660, 669 (9th Cir. BAP 2014) and in assessing motions
25 to dismiss under chapter 11. *In re Sullivan*, 522 B.R. 604, 614 (9th Cir. BAP
26 2014). In an unpublished decision, a bankruptcy court in Idaho has applied the
27 “preponderance of the evidence” standard in a chapter 13 motion to dismiss. *In*
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1 *re Kieffer*, 2015 WL 7450087 at *5 (Bankr. D.Idaho, November 23, 2015).

2 The debtors cite *In re Mark*, 336 B.R. 260, 265 (Bankr. D.Maryland 2006)
3 and the Supreme Court in *Addington v. Texas*, 441, U.S. 418, 424 (1979) by
4 analogy to support their contention that a “clear and convincing” standard of
5 proof applies to the court’s determination that the debtors’ chapter 13 case was
6 not filed in good faith. The argument is misplaced. The court in *Mark* was
7 deciding a motion under § 362(c)(3) to extend the automatic stay where the
8 *presumption of bad faith* had arisen. Section 362(c)(3)(C) specifies that “clear
9 and convincing” is the standard of proof the debtor bears in rebutting the
10 statutory *presumption* of bad faith. The *Addington* case dealt with the standard of
11 proof needed to civilly commit someone involuntarily to a state mental hospital.
12 Neither case stands for the proposition that the “clear and convincing” standard
13 should supplant “preponderance of the evidence” in assessing a motion to dismiss
14 under § 1307. This court will apply the “preponderance of the evidence”
15 standard.¹²

16 The burden of proof squarely lies with the movant in this case, Bunnett.
17 The determination of whether a debtor filed a petition or plan in bad faith and
18 that dismissal for cause is justified is left to the sound discretion of the
19 bankruptcy court. *In re Leavitt*, 171 F.3d at 1222-23; *In re Marsch*, 36 F.3d 825,
20 828 (9th Cir. 1994); *Greatwood v. U.S. (In re Greatwood)*, 194 B.R. 637-39 (9th
21 Cir. BAP 1996), *aff’d*, 120 F.3d 268 (9th Cir. 1997). The *Leavitt* factors will be
22 applied to Frank and Mary successively.

23 2. The First *Leavitt* Factor: Misrepresentation of Facts in Petition, Unfair
24 Manipulation of the Bankruptcy Code or Otherwise Filed Chapter 13 Petition in

25
26 ¹²The court also notes that unlike the fundamental right of liberty discussed in
27 *Addington*, “a debtor has no constitutional or ‘fundamental’ right to a discharge in
28 bankruptcy.” See, *Grogan v. Garner*, 498 U.S. 279, 286 (1991) citing *U.S. v. Kras*, 409
U.S. 434, 445-46 (1973).

1 an Inequitable Manner.

2 Frank Does - A finding of bad faith supporting dismissal of a bankruptcy
3 case does not require fraudulent intent by the debtor. *In re Leavitt* 171 F.3d at
4 1224; *In re Gress*, 257 B.R. 563 (Bankr. D.Mont. 2000). The court in *Gress*
5 noted:

6 Neither malice nor actual fraud is required to find a lack of good
7 faith. The bankruptcy judge is not required to have evidence of
8 debtor illwill directed at creditors, or that debtor was affirmatively
attempting to violate the law-malfeasance is not a prerequisite to
bad faith.

9 *Gress* at 568 quoted in *Luxord* at 70-71. See also, *In re Powers*, 135 B.R. 980,
10 994 (Bankr. C.D. Cal. 1991) (relying on *In re Waldron*, 785 F.2d 936, 941 (11th
11 Cir. 1986).

12 The court had the opportunity to observe Frank's demeanor as a witness.
13 Frank's testimony was often combative, especially when questioned by opposing
14 counsel. The court admonished him on many occasions to answer the question
15 asked and not discuss matters beyond the scope of the question or even on the
16 same topic. Frank's testimony was contradicted by other witnesses or simply not
17 credible.

18 For example, Frank's testimony was internally inconsistent on the issue of
19 him "backing up" the Bunnett computer before it was returned. He testified that
20 he updated the computer with a Windows 10 program was "inadvertent."¹³
21 However, he also testified that before updating the computer, he backed up the
22 files to prevent possible loss, thus contradicts the claim that updating was
23 "accidental." Then he also stated that updating the computer was something
24 "everyone did." His testimony also conflicted with that of his wife, Mary Anne,
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26 ¹³Testimony of Frank Does. 1-88:22-89:24. There were three days of testimony.
27 Transcript references will begin with the day of testimony ("1," "2," or "3") followed by
28 page and line numbers.

1 with respect to the services performed by Mary Anne for Paros' benefit. Mary
2 Anne testified that the work for Paros was "not an appraisal." Frank testified that
3 his wife performed appraisal services for Paros. Frank testified that he did not
4 work for Agrofin, the subsidiary of Wawasan, or assist them with sales of
5 product in October and November 2015. Frank later testified and explained he
6 provided "assistance" and that "you don't close doors."

7 The court finds as fact that the inconsistencies in Frank's testimony
8 substantially reduced his credibility in testifying on critical issues in the trial on
9 the Motion. His testimony is not completely credible and was entitled to little
10 probative weight without corroboration. *In re Taylor*, 514 F.2d, 1370, 1373-74
11 (9th Cir. 1975).

12 Frank was not candid when he signed his declaration regarding the
13 adjustment to the chapter 13 Means Test.¹⁴ Frank stated in a written declaration
14 that "he is on disability and he is not able to work due to symptoms caused by the
15 stress related to his employment with Bunnett." He also stated that when he does
16 return to work, he will not be able to work in the same kind of high-stress
17 environment as before. However, other testimony significantly conflicts with
18 Frank's statements. Ray Gearhart, a former sales agent for Bunnett, testified that
19 Frank told him shortly after separating from Bunnett that he was applying to be a
20 distributor for similar dairy industry nutrition products, including those sold by
21 OCI and Wawasan. There is also Frank, Ray Gearhart and John Franklin's
22 aborted negotiations with Natural Soda.

23 Brian D'Ewart who worked for Dewco, another feed product
24 representative, testified that Frank offered services in trying to help him source
25 products. Frank introduced Mr. D'Ewart to other suppliers of potassium
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27 ¹⁴Doc. #1.
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1 carbonate. Frank also connected the Dewco company with Agrofin. Andy Lott,
2 a hauler, testified that Frank spoke to him on the phone and told him that he
3 would be setting up a company, FM Ag, to source product. His communications
4 included Frank arranging another supplier in the industry, Mission Ag, to “book a
5 load” with Lott Trucking. Frank also negotiated with Wei K. Yong Su to be a
6 sales agent for Agrofin and to be paid a commission. Wei Su worked with
7 Agrofin. These negotiations did not result in an agreement.

8 When confronted with these facts, Frank testified that he either did not
9 remember or he was “helping friends.” At one moment, Frank testified that
10 helping his friends was not the same thing as “assistance.” He also testified that
11 during the period beginning in November of 2015 to an uncertain date, he
12 blocked cell phone calls. Yet, the record is replete with numerous contacts that
13 suggest otherwise. While Frank’s memory loss due to stress and the medications
14 he was taking combating that stress are certainly legitimate, Frank’s actions in
15 continuing to maintain contact are strongly inconsistent. While the court cannot
16 make a finding as to the legitimacy of Frank’s claim for disability benefits and
17 will not, the fact is that his activities, whether or not “anti-competitive” to
18 Bunnett, are not consistent with statements in a declaration relating to Frank’s
19 ability to contribute income to fund a chapter 13 plan.

20 The court finds as fact that Frank’s declaration dated January 22, 2016,
21 filed with the court as part of the schedules in this case is, at best misleading and,
22 at worst, knowingly false.

23 Even after Frank and Mary Anne filed bankruptcy, Frank’s contacts in the
24 industry continued. Ray Gearheart testified that in March 2016, Frank told him
25 that several dairymen, all of whom Frank dealt with, shifted their source of inert
26 fats from Bunnett to Wawasan. There is also testimony of post-petition contacts
27 between Frank and Deb Mize of Mission Ag, Brian D’Ewart of Dewco and
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1 others. Ray Gearheart testified that Frank did provide phone numbers for a
2 prospective customer, he also testified that Frank never helped make any sales for
3 Mr. Gearheart, who is employed as a salesman for Agrofin.¹⁵

4 However, Frank's explanation to the court for making these contacts was
5 either to "help friends" or to arrange for employment "at some future time."
6 Further, Frank stated that, to him, it was not work because "he did not get paid
7 for it." Frank justified these contacts by saying these suppliers and customers of
8 Bunnett first contacted him because they were dissatisfied with Bunnett.
9 However, there was no testimony that Frank told former customers he was
10 disconnecting from the business. Andy Lott, the hauler, did testify that Frank
11 told him he needed to "tend to his (Frank's) health due to stress he had
12 experienced in the last ten to twelve years." However, even Frank testified that
13 he did not tell any suppliers or customers that he was not disengaging from the
14 business, indicating his intention to continue in the same business that had caused
15 his stress. These contradictory statements and positions further reduce the
16 credibility of Frank's testimony and declaration regarding his disability.

17 The court finds as fact that even after the filing of the petition, Frank was
18 continuing to contact or be contacted by customers and suppliers contradicting
19 his statements in the declaration filed with the petition that once he returned to
20 work he would not be able to continue in the "high stress" job he had worked in
21 before.

22 In addition to the inconsistent statements in the declaration, Frank failed to
23 reveal on the bankruptcy schedules the \$40,000 payment from Wawasan that had
24 been filtered through Ray and Todd Gearheart and paid to friends and family
25 members. On this issue, the evolution of the reasons why the payment was not
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27 ¹⁵Ray Gearheart deposition August 23, 2016, 125:17-126:10.
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1 disclosed calls into question the *bona fides* of the schedules. In a declaration
2 filed June 21, 2016, in connection with the aborted settlement agreement, Frank
3 stated that he did not actually receive the \$40,000 but “h[a]s been told that they
4 [sic] were sent to friends and family members to be used for my benefit if I
5 requested.”¹⁶ Frank stated that since he never had, touched or asked for the
6 money, it was not disclosed. However, other testimony is contradictory. Ray
7 Gearheart testified that in early January 2016, he discussed with Frank payments
8 from Wawasan and possibly sending checks to other people since Frank was
9 being sued by Bunnett. Ray Gearheart told his son, Todd Gearheart, that they
10 needed to distance themselves from any transactions with Wawasan, for Frank’s
11 benefit because Bunnett’s lawyers were “watching them like hawks.” Yet Frank
12 told Ray Gearheart, who arranged for the funds transfer, the names of the people
13 who were to receive the monies. Ray Gearheart instructed his son, Todd, who
14 initially received the funds from Wawasan, to send the money to specific persons.
15 Todd Gearheart testified that the intent was that the money was to end up in
16 Frank’s hands. Frank told his brother-in-law, Marcio Relva, in January 2016 that
17 he (Relva) “might be receiving a check in the mail.” Frank asked Angel
18 Hernandez, a friend, if someone could send a check to him “in my name.” Frank
19 told his mother, Mary Does, January 2016 that someone “may send a check to
20 her.”¹⁷ The check Mary Does received was made out to Teresa Miranda, Mary
21 Does’ mother, and Frank’s grandmother.¹⁸ Frank says that he disclaimed the
22 funds and did not consider them his. However, even if the court would construe
23 a \$40,000 payment from a company that has no real relationship to Frank other

25 ¹⁶Doc. #143.

26 ¹⁷1-192:5-9.

27 ¹⁸1-190:2-191:19.

1 than as a potential employer or supplier as a gift, that is no excuse not to reveal
2 that information in the schedules.

3 Equally disconcerting is the amount of time between receipt of the monies
4 by Frank's family and friends and the disclosure of the information. It was not
5 until June 2016, nearly six months after the bankruptcy was filed, that the
6 transaction was disclosed. Still, the transaction is not included in any amended
7 schedules.

8 The court finds as fact that Frank knew of the impending payments from
9 Wawasan in January and March 2016 and did not reveal these transfers on his
10 bankruptcy schedules.

11 Mary Anne Souza Does - The court observed the demeanor of Mary Anne
12 as a witness. She was direct and responsive to the questions asked of her by
13 opposing counsel and her counsel. She did not evade when asked questions
14 concerning the 2016 money transfers from Wawasan and was cooperative when
15 reviewing documents. While an earnest witness, the objective facts in this matter
16 largely refute her version of events.

17 FM Ag Enterprises, the company established by Frank and Mary Anne in
18 October 2015, was, according to Mary Anne, to be a vehicle for her appraisal
19 business. However, the formative documents state otherwise. Bunnett has made
20 much of the fact that FM Ag Enterprises received \$20,000 for a purported
21 "market survey" prepared by Mary Anne for Paros, a Wawasan subsidiary.
22 However, Mary Anne has not been able to produce a copy of the document even
23 though she testified she prepared the report on her own computer. While by itself
24 suspicious, Bunnett has produced no evidence affirming that Paros/Wawasan did
25 not receive the report or denied commissioning a report. This is true even though
26 Bunnett offered the testimony of Wei Su of Agrofin (by deposition) in support of
27 its case. The court was directed to no testimony confirming Bunnett's theory that
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1 the report was a pretense for a payment by Wawasan for Frank's benefit.

2 The court finds as fact Bunnett has not met its burden of proof that the
3 payment for the market report prepared by Mary Anne for Paros was other than a
4 payment for services rendered.

5 Mary Anne has maintained that she first learned of the \$40,000 payment
6 from Wawasan in June 2016 in connection with the aborted settlement of the
7 issues between Bunnett and the Dorees at the time she signed her declaration
8 concerning that settlement agreement.¹⁹ She also maintains that she did not know
9 that any of the funds were used for her family's benefit. Mary Dorees, Mary
10 Anne's mother-in-law, is a frequent visitor at Frank and Mary Anne's residence
11 and assists with the care of Frank and Mary Anne's children. Part of the money
12 Mary received from Wawasan was used to pay bills for Frank, including private
13 school tuition and a timeshare.²⁰ Mary claims that she took the tuition bill and
14 did not tell anyone and paid the bill.²¹ Mary said she had never done that
15 before.²² Mary Anne's declaration signed in connection with the settlement says
16 that she never directly or indirectly received any payment or anything of value
17 from Todd Gearheart or Wawasan. That is simply false. The payment of their
18 children's tuition and payment for the timeshare Mary made with those funds
19 clearly benefitted the family.

20 At the same time, there is no direct evidence that Mary Anne knew of the
21 payments at the time the schedules were signed or the amendments filed.
22 However, the schedules clearly state that it is both spouses' responsibility to be
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24 ¹⁹Doc. #143.

25 ²⁰1-194:14-195:18.

26 ²¹1-196:17-197:6.

27 ²²*Id.*

1 fully candid in providing information in the schedules.

2 In discovery in this case, Mary Anne declined to answer certain deposition
3 questions on the ground of the marital-communication privilege. The court has
4 not found authority stating that an adverse inference is warranted where a party
5 has invoked the marital-communication privilege. However, the same or similar
6 consequences are at risk if an adverse inference could be drawn from someone
7 invoking the attorney-client privilege. Like the attorney-client privilege which is
8 “regarded as of sufficient social importance to justify some sacrifice of the
9 availability of evidence relevant to the administration of justice.” *Knorr-Bremse*
10 *Systeme Fuer Nutzfahrzeuge GmbH v. Dana Corp.*, 383 F.3d 1337, 1344 (Fed.
11 Cir. 2004) (*en banc*) (citation and internal quotations marks omitted). The
12 marital-communications privilege [which] protects the marital bond, is
13 considered to have a value “higher than truth.” *Whitney v. City of Milan,*
14 *Tennessee* 2014 WL 11411675 (WD Tennessee, February 27, 2014) quoting
15 *United States v. Brown*, 605 F.2d. 389, 396 (8th Cir. 1979) *cert. denied*, 444 U.S.
16 972 (1979).

17 The court finds that Bunnett is not entitled to an adverse inference that
18 Mary Anne discussed with Frank the monies paid or to be paid by Wawasan at
19 the time the petition was filed because she invoked the marital-communication
20 privilege

21 Nevertheless, the court takes seriously Mary Anne’s obligation to
22 independently verify the truth of statements made in the schedules. The court
23 notes that it is inconsistent with the closeness of the Does’ family and the
24 assistance that Mary provided to Frank and Mary Anne that it would not “come
25 up” in conversation about payments received by Mary from Todd Gearheart or
26 that Mary used some of those funds to pay Mary Anne’s children’s school tuition.
27 This inconsistency is further bolstered by the fact that Mary testified that she had
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1 not paid bills for Mary Anne and Frank before. This unconventional occurrence
2 would certainly be the topic of a comment or conversation.

3 Independently, Marcio Relva, Mary Anne's brother-in-law, received
4 \$5,000 on or about January 27, 2016. Wouldn't this spark a comment or
5 conversation between Relva and Mary Anne or at least between Mary Anne and
6 her sister? Finally, Frank was highly compensated by Bunnett before leaving.
7 The substantial change in the Dore's economic position between September 2015
8 to January 2016 suggest that both Frank and Mary Anne were aware of their
9 financial needs and were vitally interested in how those needs would be satisfied.
10 It is simply not credible that Mary Anne knew nothing of the Wawasan payments.

11 The court notes that Mary Anne and Frank were represented by competent
12 counsel at the time of the filing of the bankruptcy case and throughout the case.
13 The Debtors, being represented by an attorney, "can be charged with constructive
14 knowledge of the law's requirements." *Stallcop v. Kaiser Foundation Hospitals*,
15 820 F.2d 1044, 1050 (9th Cir. 1987). Even in the unlikely event that Mary Anne
16 did not know or have reason to know of the assistance of the Wawasan payments,
17 she and Frank are charged with knowing the requirements of law.

18 The court finds as fact that Mary Anne knew, should have known or had
19 the means to learn of the Wawasan payments at the time of the filing of the
20 bankruptcy case and certainly thereafter in time to testify truthfully at the first
21 meeting of creditors or when amended schedules were filed. The payments were
22 not disclosed.

23 Based on the above findings of fact, the court finds Frank and Mary Ann
24 misrepresented facts in their petition, schedules, accompanying declarations and
25 testimony at the meeting of creditors. The first *Leavitt* factor favors Bunnett.

26 3. The Second *Leavitt* Factor: Debtors' History of Filings and Dismissals.

27 The court has been provided no evidence that either Frank or Mary Anne
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1 have filed any previous bankruptcy case. The court therefore finds this factor in
2 favor of Frank and Mary Anne.

3 4. The Third *Leavitt* Factor: The Debtor's Intention to Defeat State Court
4 Litigation.

5 Frank Does - At the time the bankruptcy was filed, Frank was embroiled
6 in litigation with Bunnett over his leaving the companies and allegedly interfering
7 with their customers and suppliers. A temporary restraining order was issued by
8 the Texas state court as well as the Texas Federal District Court. During the
9 pendency of the Federal litigation, the bankruptcy was filed.

10 The impact of this litigation on the decisions Frank made is evidenced in
11 at least three instances. First, in November 2015, Frank quickly aborted final
12 negotiations and execution of a sales representative agreement with one of
13 Bunnett's suppliers, Natural Soda. Ray Gearheart testified that it was his
14 understanding Frank aborted the negotiations because of his fear of being sued.

15 Second, the structure of the Wawasan payments seem designed to avoid
16 the effect of the injunction issued by the Federal District Court in Texas. Todd
17 Gearheart testified that he was told by Ray Gearheart that the payments were
18 going to be made indirectly because Frank was "hampered by an injunction."

19 Third, Frank initially pursued a worker's compensation claim against
20 Bunnett for job-related stress. That claim was later withdrawn in favor of a
21 disability claim which, according to the Gearhearts, was largely litigation
22 connected. Also, a review of the bankruptcy schedules shows that, other than the
23 Bunnett litigation, there was no other claim or aggressive creditor action facing
24 Frank or Mary Anne at the time the bankruptcy was filed.

25 Bad faith exists where the debtor's only purpose is to defeat state court
26 litigation. *In re Eisen*, 14 F.3d at 470. The evidence strongly suggests that, as to
27 Frank, his only purpose for filing was to encumber litigation. By the time the
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1 bankruptcy was filed the Texas District Court had issued a temporary restraining
2 order. The Texas state court had issued one earlier. Also, Frank knew that he
3 had contacted or been contacted by customers or suppliers of Bunnett and was
4 continuing to maintain those contacts. He told some of those suppliers and
5 customers that he was looking forward to working with them whether then, or
6 sometime in the future.

7 The court finds as fact that Frank's primary purpose in filing the
8 bankruptcy petition was to avoid or defeat the pending litigation against him
9 prosecuted by Bunnett.

10 Mary Anne Souza Does - Mary Anne was not named as a defendant in the
11 Bunnett litigation so the court could not find that defeating state court litigation
12 was the only purpose Mary Anne had in joining the bankruptcy petition. She was
13 faced with a substantial loss of income affecting her family and she testified that
14 she was going to need to substantially increase her own workload in order for her
15 family to make ends meet. The defense of the Bunnett litigation would certainly
16 have depleted Frank and Mary Anne's community property. There were many
17 other motivating factors facing Mary Anne who was not a party to the litigation.
18 Some of those factors may have also entered into Frank's decision to file the
19 bankruptcy case. However, the difference is that Frank was a named defendant
20 and was already subjected to two temporary restraining orders. Mary Anne was
21 not at the time of the filing of the bankruptcy case.

22 The court finds as fact that defeating state court litigation was not the
23 primary factor in Mary Anne joining in the bankruptcy petition.

24 5. The Fourth Leavitt Factor: The Presence of Egregious Behavior.

25 Frank Does - In making a determination of whether egregious behavior is
26 present, the court considers the debtors' pre-petition conduct as well as post-
27 petition conduct. *In re Luxford*, 368 B.R. at 74 citing *In re Pickering*, 195 B.R.

1 759, 765 (Bankr. D.Montana 1996), citing *Neufeld v. Freeman*, 794 F.2d 149,
2 152-53 (4th Cir. 1986); *see also Solomon v. Cosby (In re Soloman)*, 67 F.3d
3 1128, 1134 (4th Cir. 1995). Egregious behavior, such as concealing information
4 from the court, violating injunctions, filing unauthorized petitions, hiding or
5 undervaluing assets, making post-petition payments to pre-petition creditors,
6 violating non-bankruptcy laws or otherwise demonstrating fraudulent conduct,
7 without excuse, demonstrates bad faith and prejudices creditors. *See In re*
8 *Chabot*, 411 B.R. 685, 704-05 (citing *Leavitt*, 171 F.3d at 1223-24) and *In re*
9 *Cortez*, 349 B.R. 608, 613-14 (Bankr. N.D. Cal. 2006).

10 Pre-petition, Frank negotiated with at least one Bunnett supplier and
11 almost signed a sales agreement. He also either inadvertently or intentionally
12 erased data on a company computer before returning it to Bunnett.²³

13 As set forth in the court's previous findings, Frank knew of the Wawasan
14 payments, identified those who should receive them and continued to maintain
15 that he had no knowledge of them and disclaimed them. Those payments
16 remained hidden until June 2016 when Bunnett discovered them.

17 A false oath may involve a false statement or omission in the debtor's
18 bankruptcy schedules or statement of financial affairs. *Searles v. Reilly, Chapter*
19 *7 Trustee (In re Searles)*, 317 B.R. 368, 377 (9th Cir. BAP 2004); *Fogel Legware*
20 *of Switzerland, Inc. v. Wills (In re Wills)*, 243 B.R. 58 (9th Cir. BAP 1999). A

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22 ²³Bunnett offered the expert testimony of a computer forensics expert, David
23 Kalat, who opined that Frank's installation of the Windows 10 upgrade was
24 intentionally done resulting in compromising historical data on "the hard drive" and
25 Frank eliminated over 1,000 files from the computer. In post-trial submissions, the
26 Does argue that Kalat's testimony should not be accepted because he was not "offered"
27 as an expert. The court notes that no objection was made by the Does' counsel at the
time of Mr. Kalat's testimony or request to *voir dire* the witness. Independently, the
court notes the Federal Rule of Evidence 702 does not require any particular procedure
for the trial court to follow with respect to expert testimony. *See Metabolife*
International Link v. Ornick, 364 F.3d 832, 843 (9th Cir. 2001); *Kumho Tire Company,*
Ltd. v. Carmichael, 526 U.S. 137, 152 (1999); *First Marblehead Corporation v. House*,
541 F.3d 36, 41 n.3 (1st Cir. 2008).

1 false oath is complete when it is made. *In re Searles* at 377. “Where the
2 offending oath is contained in the schedules or required statements, the debtor’s
3 continuing duty to assure the accuracy of such schedules and statements means
4 that the proper method of correction is a formal amendment of the schedules.”
5 *Id.* No such amendment occurred.

6 The court finds as fact that Frank concealed from the court the Wawasan
7 payments even though he had knowledge of them and that was egregious.

8 Mary Ann Souza Dorez - As set forth above, the court has found that Mary
9 Anne knew, or had reason to know and the means to find out, about the Wawasan
10 payments. The court has also found that Bunnett has failed to prove by a
11 preponderance of the evidence any pre-petition egregious behavior by Mary Anne
12 Dorez. However, the knowing concealment of the Wawasan payments and the
13 delay in revealing the payments does amount to egregious behavior.

14 Independently, the court is troubled by the testimony of family friend,
15 Angel Hernandez, who testified that in July 2016, shortly after the filing of the
16 June declaration, Mary Anne told Angel Hernandez that he could do anything he
17 wanted with the money he received.²⁴ Mr. Hernandez’ testimony on this subject
18 has not been refuted. This aggravates the concealment and shows a cavalier
19 attitude towards Mary Anne’s disclosure duties under the bankruptcy law.

20 The court finds as fact that Mary Anne was complicit in concealing the
21 Wawasan payments from the court and disregarded her disclosure obligations
22 under the bankruptcy law which was egregious.

23 6. Mitigating Factors.

24 Frank Dorez - Frank’s stress, which he testified was caused by his
25 deteriorating relationship with Bunnett, resulted in him being diagnosed with

27 ²⁴2-48:23-49:16.

1 depression and other disorders. Debtors called an expert, Dr. Howsepian, a well
2 qualified board certified psychiatrist for over 20 years. After examining Frank in
3 October 2016, he noted that Frank was suffering from several anxiety induced
4 disorders, including dissociative disorder, anxiety disorder, panic disorder and
5 bipolar disorder Type 1. Dr. Howsepian also reviewed various medications
6 Frank had been taking and determined that Frank was not fabricating memory
7 loss during the period before the examination. He concluded that Frank had a
8 loss of memory and a loss of cognitive function. This explains Frank's lack of
9 recollection of specific events, however makes other testimony about those
10 events uncontroverted. Dr. Howsepian did not opine about Frank's capacity for
11 veracity when he signed the schedules and declarations at issue in this case.

12 The fact that approximately \$20,000 of the original \$40,000 of the
13 Wawasan payments has been returned to Debtors' counsel is another mitigating
14 factor but does not excuse the failure to disclose the payments.

15 There is no evidence the Debtors have failed to perform their chapter 13
16 plan thus far indicating that, for now, the Debtors are complying with their
17 obligations. While not excusing egregious actions surrounding disclosure
18 requirements, it does suggest that Frank and Mary Anne are attempting to comply
19 with their obligations under chapter 13. The confirmed plan provides that the
20 trustee is to review the case annually and the Debtors are to provide income tax
21 returns in addition to all of Frank's pay stubs. While again not excusing the
22 failure of the Debtors to comply with disclosure obligations or submitting
23 misleading documents at the beginning of the case, the court does see this as a
24 mitigating factor.

25 Mary Anne Souza Does - As can be discerned from the previous
26 discussion, Bunnett's case against Mary Anne Does is simply not as strong as
27 the case against Frank. In addition to the mitigating factors outlined above, the
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1 court is not convinced that Mary Anne's behavior necessarily warrants a
2 dismissal with prejudice. Mary Anne is not a party to any pending lawsuit
3 involving Bunnett. The evidence against Mary Anne relating to the pre-petition
4 actions does not suggest any effort to prejudice Bunnett or any other creditor.

5 Mary Anne's demeanor as a witness shows she was trying to be
6 cooperative. Frank has been subjected to consistent and unrelenting scrutiny
7 from Bunnett in their ongoing efforts to litigate the claims they believe they have
8 against Frank.

9 In addition, the aggressive actions by Bunnett has caused Mary Anne and
10 Frank to incur a large amount of attorney's fees. At the same time, so has
11 Bunnett. However, Frank and Mary Anne being the Debtors here do not have the
12 same economic strength as Bunnett. Upon dismissal, Frank will likely be named
13 in Bunnett's pending litigation in the Northern District of California. However,
14 the benefit of bankruptcy protection comes with costs. One cost is candid
15 disclosure of assets.

16 The court finds as fact after weighing the totality of the circumstances that
17 there is cause to dismiss the bankruptcy case on the grounds of bad faith. The
18 mitigating factors have been considered by the court in reaching this conclusion.

19 7. Dismissal is in the Best of the Creditors.

20 Once cause for dismissal is established, the court must determine if the
21 case should be converted or dismissed. 11 U.S. C. § 1307(c). The decision is
22 motivated by an analysis of "whichever is in the best interest of creditors and the
23 estate." § 1307(c).

24 The court has reviewed the schedules in this matter. Other than the
25 recovery of approximately \$20,000 which has been turned over to Debtors'
26 counsel, a conversion of the case to a chapter 7 is not of any benefit to the
27 creditors. Recovery of the remaining \$20,000 will require prosecution of an
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1 adversary proceeding with attendant litigation and collection risks. The Debtors
2 have exempted most of the equity they have available in any assets. There are a
3 few timeshare interests which, in the court's experience, do not generate a great
4 deal of interest in trustees because they often do not result in recovery of
5 substantial sums for the benefit of creditors. There are vehicles which are
6 encumbered but if the equity is not exempt in the vehicles, the Debtors would be
7 able to amend schedules to do so.

8 The overarching rationale for this decision, however, is the substantial
9 administrative expense which is involved in the case. The Debtors have been
10 embroiled in the litigation with Bunnett on this Motion for nearly a year. They
11 have incurred substantial attorney's fees. While a large part of the Dore's
12 counsel's efforts did not benefit the bankruptcy estate, some claims will be made.
13 Thus, any "victory" for creditors by way of a dividend would be Pyrrhic, at best.
14 Therefore, there is no substantial benefit to creditors in converting the case to
15 chapter 7 and dismissal appears to be the best interest of the creditors and the
16 estate.

17 8. Dismissal With Prejudice.

18 As is clear from the above discussion, the court has analyzed the *Leavitt*
19 factors as they apply to both debtors in this case. In *Leavitt*, the Ninth Circuit
20 held a dismissal with prejudice must be coupled with a finding of bad faith based
21 on egregious conduct. *In re Leavitt*, 171 F.3d at 1224. In other words, dismissal
22 with prejudice under § 349(a) is not meant to be a remedy for every instance of
23 debtor misconduct. *Id.*

24 This court has weighed the totality of circumstances, including all
25 mitigating factors, and is convinced based upon the findings set forth above,
26 credibility of the witnesses the court has observed, the exhibits, and the
27 deposition testimony offered by both parties, that the dismissal of Frank's case
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1 should be with prejudice. There are numerous instances of egregious conduct
2 coupled with bad faith. However, the mitigating factors support the dismissal
3 should be coupled with a bar of limited duration.

4 In contrast, while Mary Anne's case should be dismissed for cause due to
5 "bad faith," the mitigating factors weigh heavily against a dismissal with
6 prejudice. While some of Mary Anne's conduct is egregious, the mitigating
7 factors outweigh any type of bar at this time.


8 9 CONCLUSION

10 "The Bard" in a dramatic fashion has exposed the consequences of the
11 human frailty of revenge. Those consequences include the unintended
12 conclusions to recriminatory plans and schemes that have occurred in this case
13 with neither side achieving its intended goal. The court hopes that the curtain
14 falls on this tragedy now.

15 Bunnett's motion to dismiss is granted. Frank Miranda Does is barred
16 from filing another bankruptcy case for a period of 180 days from the date the
17 order dismissing the case is final. Mary Anne Souza Does is not barred from
18 refiling. A separate order shall issue.²⁵

19
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21 Dated: Jun 07, 2017

By the Court

22
23 
24 René Lastreto II, Judge
United States Bankruptcy Court

25
26 ²⁵The above constitutes the court's findings of fact and conclusions of law
27 pursuant to FRCP 52 made applicable to bankruptcy contested matters by Rules 9014(c)
28 and 7052.

Instructions to Clerk of Court
Service List - Not Part of Order/Judgment

The Clerk of Court is instructed to send the Order/Judgment or other court generated document transmitted herewith to the parties below. The Clerk of Court will send the Order via the BNC or, if checked ☐, via the U.S. mail.

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